In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 654

NG SUI SANG, PETITIONER

v.

P. A. ESPERDY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. 6-8; Pet. App. 9-11) is reported at 335 F. 2d 656. The opinion of the district court (R. 2-5) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1964 (R. 9). The petition for a writ

of certiorari was filed on November 5, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioner, an alien crewman who had been paroled into the United States for such time as his vessel remained in this country, made an "entry" into the United States when he failed to depart on board his ship and the immigration authorities continued his parole until such time as his ship returned to the United States.

2. Whether due process required that petitioner be accorded a hearing upon termination of his parole.

STATUTE AND REGULATION INVOLVED

Section 212(d)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 182, 188, 8 U.S.C. 1182(d)(5), provides:

> The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

Immigration and Naturalization Service Regulation No. 212.5, 25 F.R. 7014, 8 C.F.R. (1964 Cum. Supp.) 212.5, provides in pertinent part:

> The district director in charge of a port of entry may, * * * after a finding of inadmissibility has been made, parole into the United States temporarily in accordance with section 212(d)(5) of the Act any alien applicant for admission at such port of entry under such terms and conditions * * * as such officer shall deem appropriate. At the expiration of the period of time or upon accomplishment of the purpose for which parole was authorized or when in the opinion of the district director in charge of the area in which the alien is located that neither emergency nor public interest warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he shall be restored to the status which he had at the time of parole, and further inspection or hearing shall be conducted under section 235 or 236 of the Act and this chapter, or any order of exclusion and deportation previously entered shall be executed.

STATEMENT

Petitioner is a native of China who last arrived at the Port of New York, United States, on June 30, 1962, when he applied for shore leave as a non-immigrant crewman attached to a merchant vessel (see R. 2, 7; G. Ex. "A"). Shore leave was denied to the petitioner and other crew members. Shortly thereafter, the Immigration and Naturalization Service

issued petitioner a parole card which recited, *inter alia*: "Your admission cannot be authorized at this time. You are PAROLED until July 29, [19]62 * * * or till ship sails foreign" (G. Ex. "A"). On July 10, 1962, petitioner left his ship. On July 17, 1962, the Service noted that petitioner was "discovered missing", and on July 20 petitioner's vessel left New York without him (see R. 2, 7; G. Ex. "A").

On January 18, 1963, petitioner was arrested by immigation officials for violation of his parole. He was, however, subsequently released on $1,000 bond pending return of his ship. In May 1963, when petitioner's ship returned to the United States, the Service directed the bonding company to surrender the petitioner into custody of the Service in New York City (G. Ex. "A"). The directive, a copy of which was mailed to the petitioner, recited that "YOUR PAROLE WILL BE REVOKED UPON YOUR SURRENDER" (*ibid.*).

The instant proceeding was commenced on May 24, 1963, when petitioner and another crewman-parolee similarly situated[1] filed a complaint in the United States District Court for the Southern District of New York, contending that the Service intended summarily to revoke their parole status and remove them from the United States without a hearing. They requested that the Service be required to accord them a hearing and be enjoined from deporting them. Thereafter, the Service revoked petitioner's parole. On Au-

[1] Mr. Wong Hing Fun, whose case was decided with petitioner's in the lower courts, has not joined in the petition for a writ of certiorari.

gust 15, 1963, the district court granted summary judgment for the defendant (R. 2-5). The court of appeals affirmed on August 20, 1964 (R. 6-8; Pet. App. 9-11).

ARGUMENT

Petitioner contends (Pet. 3-7) that he should have been accorded a formal hearing under the deportation provisions of the 1952 Act because he must be deemed to have made an "entry" into the United States, albeit an illegal one, when he failed to depart from this country on his ship in 1962. The short answer is that petitioner can gain no legally cognizable status because of his act in violation of parole. Section 212 (d)(5) expressly provides that the temporary parole of an alien into the United States "shall not be regarded as an admission of the alien." See, to the same effect, *Leng May Ma* v. *Barber*, 357 U.S. 185, 188-190; *Rogers* v. *Quan*, 357 U.S. 193, 194, 196; *Shaughnessey* v. *United States ex rel Mezei*, 345 U.S. 206, 215; *Kaplan* v. *Tod*, 267 U.S. 228, 230-231; *United States* v. *Ju Toy*, 198 U.S. 253, 263; *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 661.[2]

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[2] Contrary to petitioner's suggestion (Pet. 2, 6), there is no occasion for this Court to reconsider, in the context of the instant case, the holding in *Leng May Ma* v. *Barber*, 357 U.S. 185, where the Court held that an alien paroled into the United States was not "within the United States" for purposes of eligibility for a stay of deportation under section 243(h) of the 1952 Act. In the instant case, the question presented concerns itself with whether petitioner made an entry into the United States for purposes of the deportation provisions, a matter foreclosed by section 212(d)(5) and numerous decisions of this Court.

Petitioner's subsequent disappearance had the practical effect of extending the period of parole until he could be restored to the status of a person on board ship, but it did not change his legal status as an alien who had never made an entry into the United States. When he was apprehended, petitioner was restored to the same status as when he was paroled, an alien crewman who had not been admitted into the United States. The Service had a right to hold him as an excluded crewman until it could effect his physical departure on his ship; the fact that it was willing to permit him to be released on bond during that period in no way affects his status. Petitioner physically entered as a parolee and remained a parolee who in legal effect never entered the United States. His situation is no different than it would be if he had been paroled for 10 days for some urgent reason, such as hospital treatment, and the time had been extended because of the necessity of longer treatment. The departure of the ship would not change the legal status of such a parolee. Similarly, the departure of the ship did not change petitioner's status.

There was no requirement, as petitioner seems to suggest (Pet. 4-5), of a hearing for termination of his parole. This Court has long recognized that aliens "on the threshold of initial entry" into the United States stand on a different footing from aliens who have "once passed through our gates," and that "(w)hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Shaughnessey* v. *United States ex rel Mezei*, 345 U.S. 206, 212; *United States ex rel Knauff*

v. *Shaughnessey*, 338 U.S. 537, 544. Since Congress has not provided for a hearing upon termination of parole, petitioner was entitled to none. *Ahrens* v. *Rojas*, 292 F. 2d 406, 408-410 (C.A. 5;) see *Gomez-Fernandez* v. *Immigration and Naturalization Service*, 316 F. 2d 732, 733 (C.A. 5), certiorari denied, 375 U.S. 942. This is particularly true of petitioner, who came as a seaman with no color of any claim to be entitled to enter the United States.[3]

CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

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DECEMBER 1964

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[3] Petitioner's reliance upon *United States ex rel Paktorovics* v. *Murff*, 260 F. 2d 610 (C A. 2), is misplaced. In that case, the court held that the Hungarian parolee there involved was entitled under section 212(d)(5) of the 1952 Act to a hearing upon revocation of his parole since upon acceptance by the parolee of an official invitation by the United States government to enter this country the parolee obtained a status which entitled him to constitutional safeguards. The court stated that its decision was *sui generis* "[b]y reason of the circumstances under which the Hungarian refugees were paroled into the United States * * *." *Id.* at 613.

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